THE BRONX HOUSEHOLD OF FAITH; JACK ROBERTS; ROBERT HALL, Plaintiffs-Appellants,

v.

COMMUNITY SCHOOL DISTRICT NO. 10; CHARLES WILLIAMS, in his official capacity as President of the Board of Education for Community School Board District No. 10; THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Defendants-Appellees.

Docket No. 96-9633

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

127 F.3d 207; 1997 U.S. App. LEXIS 24202

September 15, 1997, Decided

SUBSEQUENT HISTORY: As Amended September 24, 1997.
PRIOR HISTORY: Appeal from a summary judgment for defendants entered in the United States District Court for the Southern District of New York (Preska, J.) in an action challenging on constitutional grounds the refusal of defendants to make a public school auditorium available to plaintiff Church as a place of weekly religious worship, the district court having determined that the school district had created a limited public forum with reasonable restrictions limiting its use to nonexclusive purposes.

DISPOSITION: Affirmed.

COUNSEL: JORDAN W. LORENCE, Fairfax, VA (Joseph P.

Infranco, Commack, NY, of counsel), for Plaintiffs-Appellants.

STUART D. SMITH, Assistant Corporation Counsel of the City of New York, New York, NY (Paul A. Crotty, Corporation Counsel, Barry P. Schwartz, Assistant Corporation Counsel, New York, NY, of counsel), for Defendants-Appellees.

(Marvin E. Frankel, Jeffrey S. Trachtman, Eric A. Tirschwell, Kramer, Levin, Naftalis, & Frankel, New York, NY, of counsel), for Amicus Curiae National Committee for Public Education and Religious Liberty.

(Jay Worona, General Counsel, Louis Grumet, Executive Director, New York State School Boards Association, Inc., Albany, NY, of counsel), for Amicus Curiae New York State School Boards Association, Inc.

(Steven T. McFarland, Kimberlee Wood Colby, Samuel B. Casey, Center for Law and Religious Freedom, Christian Legal Society, Annandale, VA, of counsel), for Amici Curiae Christian Legal Society, Christian Life Commission of the Southern Baptist Convention, Evangelical Lutheran Church in America, Family Research Council, Focus on the Family, and National Association of Evangelicals.

JUDGES: Before: VAN GRAAFEILAND, MINER and CABRANES, Circuit Judges. Judge Jose A. Cabranes concurs in part and dissents in part in a separate opinion.

OPINIONBY: MINER

OPINION: MINER, Circuit Judge:

Plaintiffs-appellants The Bronx Household of Faith (the

"Church"), an evangelical Christian church, and Jack Roberts and Robert Hall, its pastors, appeal from a summary judgment entered in the United States District Court for the Southern District of New York (Preska, J.) in favor of defendants-appellees Community School District No. 10 ("District # 10"), Charles Williams, President of the Board of Education of District # 10, and the Board of Education for the City of New York. The action was brought to challenge the refusal of defendants to permit the use of the gymnasium-auditorium of a District # 10 public school, the Anne Cross Mersereau Middle School ("M.S. 206B"), by the Church for weekly religious worship services. Originally filed in the Supreme Court of the State of New York, Bronx County, the complaint in the action set forth various claims pleaded under the provisions of 42 U.S.C. § 1983 and New York's declaratory judgment statute, N.Y. C.P.L.R. § 3001 (McKinney 1991): violation of the Free Speech, Free Exercise of Religion and Establishment of Religion Clauses of the First Amendment; violation of the Equal Protection Clause of the Fourteenth Amendment; and violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

District # 10 removed the action to the Southern District, where both sides moved for summary judgment. In granting summary judgment to the defendants, the district court rejected the First Amendment Free Speech claim after first determining that the Board of Education had created a limited public forum; that the restrictions imposed on the use of the forum were reasonably related to matters of legitimate government concern; and that the concern was to "preserve and prioritize access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities." The court dismissed the remaining claims without analysis. On appeal, the appellants advanced the same arguments that they advanced before the district court. We affirm the dismissal of

the Free Speech claim but disagree with the district court's analysis of "non-exclusive use." We also reject the claims unaddressed by the district court.

BACKGROUND

The use of school property for the purposes of religious worship is not among the uses designated by the New York Legislature for public schoolhouses and school grounds in New York State. However, New York Education Law does permit local school districts to adopt regulations permitting the use of such property for a great number of other purposes: educational instruction; public libraries; social, civic and recreational meetings and entertainments, and other community welfare uses, provided such uses are "non-exclusive and open to the general public"; meetings where admissions fees are charged, if the fees are expended for charitable or educational uses except for the uses of religious sects or certain exclusive societies; polling places; civic forums and community centers; classes for instruction of mentally retarded minors; recreation, physical training and athletics; child care services when school is not in session; and "graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed." N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1997).

Pursuant to § 414, the New York City Board of Education has established a written policy governing the use of school buildings and school grounds under its jurisdiction. The policy is entitled "Standard Operating Procedures: Topic 5: Regulations Governing The Extended Use of School Facilities" ("SOP"). The SOP provides that the primary use of school premises is for Board of Education activities, and that the next preference will be given to community, youth and adult group activities. The SOP then specifies the following additional

categories of permitted uses for school premises in the City of New York:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools.

Most pertinent to the appeal before us are the provisions of SOP 5.9:

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

District # 10, a public school district in the Borough of Bronx, New York City, is subject to the jurisdiction of the New York City Board of Education. M.S. 206B is a middle school facility within District # 10, with students ranging in age from 9 through 12 in grades 5 through 7. The parties agree that the use of District # 10 property is governed by the SOP and that the following organizations were permitted to use District # 10 facilities for the following purposes during the 1994-95 school year: ACAP, Inc., for a program of training and drill exercises for young people between the ages of 10 and 21; Alliance for Education, for tutoring students ages 9-12 in math and English; Boy Scouts, for training of adolescent boys in various skills, including camping and first aid; Bronx School of Music, a private school, for a concert performed by its students; Bronx YMCA, for an after-school program to tutor students ages 7-13 in math, reading and English; Bronx Youth Service, for an after-school study center tutoring students ages 7-13 in math and English; Crotona Coalition, for workshops for students on subjects such as drugs and AIDS; Edgemont Day Care, for a first aid and CPR course for its staff workers; Girl Scouts, for training girls in skills and character, including instruction in crafts, reading and other matters; Grace Lutheran Church, for a program on Black History Month; Greek Orthodox Community of Riverdale, for an afternoon school to teach young people the Greek language and history; Kingsbridge Heights, for an after-school program for students, including supervised homework assistance and instruction in dance and computer classes; Mosholu Community, for a school program for students including job preparation for teenage students and computer classes; Mount Hope Housing, for a leadership training program and other programs for students; Pius XII Beacon, for programs including after-school tutoring and character training, with no religious content; RDK West Camps, for the operation of youth programs, including crafts,

movies and games; Riverdale Community Center, for adult education classes that prepare adults to take and pass the GED exam and for after-school care and training for young people ages 7-13; South Fordham, for an afterschool program for youth; and West African Association, for a concert combining ethnic music and theater.

On one occasion in 1994 and on another occasion in 1995, the Church rented the M.S. 206B building for programs of sports and games. The Church also rented the building once in 1995 for a banquet. However, the request by the Church to rent the gymnasium at M.S. 206B "for the purpose of conducting church worship services" each Sunday was denied. In his letter to Frank Pagliuca, a District # 10 official, seeking approval for the request, Pastor Hall noted that the services would include "hymn singing, communion, Bible reading, Bible preaching and teaching." After permission was denied by Mr. Pagliuca on the basis of the SOP provision prohibiting the after-school use of school facilities by outside organizations for religious services or instruction, Pastor Hall wrote to District # 10 Superintendent Irma Zardoya. He advised Superintendent Zardoya that the Church "is a Christian church of the historic Biblical persuasion," that use of the M.S. 206B facility was necessary because of overcrowding in the Church's present meeting location and that SOP 5.9 was unconstitutional. He concluded his letter by asking that his request for use of the school facilities be reconsidered. The permit application again was denied, and the action giving rise to this appeal ensued.

In the Joint Stipulated Facts submitted to the district court, the parties stipulated as follows:

Community School District 10 has consistently followed Policy 5.9 by never renting school facilities to non-school groups or organizations, including Bronx Household of Faith,

for the purpose of conducting religious worship services and religious instruction on school premises.

DISCUSSION

I. The Freedom of Speech Claim

A. Nature of the Forum

Freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered. The Supreme Court has identified three types of forums: the traditional public forum; the designated public forum, sometimes called the "limited public forum"; and the nonpublic forum. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Traditional public forums include streets, parks and places that "by long tradition . . . have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Restrictions of speech on such property are "subject to the highest scrutiny" and "survive only if they are narrowly drawn to achieve a compelling state interest." *International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

Limited public forums are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius*, 473 U.S. at 802; *see also Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 692 (2d Cir. 1991). But restrictions on access based on speaker identity and subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint

neutral." *Cornelius,* 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). Where the proposed use falls outside of the limited forum, "the State is subject to only minimal constitutional scrutiny." *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224, 229 (2d Cir. 1996).

A nonpublic forum is government property that has not been opened for public speech either by tradition or by designation. *See Perry,* 460 U.S. at 46. In such a forum, the government may make "distinctions in access on the basis of subject matter and speaker identity." *Id.* at 49.

Appellants first contend that M.S. 206B is an open public forum from which their religious worship and religious teaching activities cannot be excluded absent a compelling state interest. In support of this contention, appellants rely on *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), in which they say that "the U.S. Supreme Court dropped an anvil-like hint that it thought this Court was incorrect in ruling that no open forum existed in that case." *Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 388 (2d Cir. 1992). The "hint" to which appellants refer was the Supreme Court's statement in *Lamb's Chapel* that "the argument [for an open forum] has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a 'close question,' which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses." 508 U.S. at 391. An argument that has "considerable force" in one case may not have quite the same force in another, however. Also, an argument of considerable force is not necessarily a winning argument. In any event, the Supreme Court in *Lamb's Chapel* specifically declined to rule on the open forum question, stating that "even if the courts below

were correct in this respect -- and we shall assume for present purposes that they were -- the judgment below must be reversed." *Id.* at 391-92.

In *Lamb's Chapel*, an evangelical church sought permission to use public school facilities in Center Moriches, New York, to show a six-part film series on Child Rearing and Family Issues. The series was said to emphasize traditional Christian family values and thereby was designed to counteract the undermining influences of the media. Relying on the state education law and local rules similar to those adopted by the New York City Board of Education specifying permissible uses, the Center Moriches School District denied use of school premises for the film series. The rule prohibiting religious uses was even more stringent than the prohibition imposed by the New York City Board of Education. It provided that "the school premises shall not be used by any group for religious purposes." *See id.* at 387 (alteration in *Lamb's Chapel*). In reversing this Court, and in allowing the use sought, the Supreme Court concluded that the rule in question was unconstitutionally applied. In arriving at that conclusion, the Court found:

There is no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted . . . . That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication . . . that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid . . . .

Id. at 393-94. What the Court therefore found unacceptable was the fact that the film series, dealing with subject matter

otherwise permissible under the school district's rule, was blocked solely because it dealt with the subject matter from a religious viewpoint.

SOP 5.9, while prohibiting outside organizations from the after-school use of school premises in District # 10 for religious services or instruction, specifically permits use by such organizations "for the purposes of discussing religious material or material which contains a religious viewpoint." Presumably, the showing of the film series described in *Lamb's Chapel* is permissible under the rules governing District # 10. What is not permitted under SOP 5.9 is the use of school premises for worship or religious instruction, and it is important to note that the parties have agreed that District # 10 never has rented school property for that purpose. This limitation is characteristic of a limited forum, for it represents the exercise of the power to restrict a public forum to certain speakers and to certain subjects. It would seem to go without saying that certain types of speech may be prohibited in public schools, even after school hours. M.S. 206B simply is not a place that has been devoted to general, unrestricted public assembly by long tradition or by policy or practice. *Cf. Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366, 1378-79, 1382 (3d Cir. 1990) (permitting indiscriminate access tc high school facility created open forum so as to allow use of facility after school hours for religious speech and worship). It is not an open public forum as that term has been defined by the Supreme Court.

Widmar v. Vincent, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981), upon which appellants rely in connection with their arguments for an open forum, is inapposite. In that case, a student religious group was denied permission to use the facilities of a public university on the basis of the university's regulation prohibiting the use of buildings and grounds for religious worship or religious teaching. The Court found that

the university had created a forum generally open for use by student groups. *See id.* at 267. Accordingly, the Court applied the standard of review for content based exclusions -- the need to show a compelling state interest and a regulation narrowly drawn to achieve that end -- and found the standard unmet. A public university is, of course, much different from a public middle school in terms of traditional openness. *See id.* at 267 n.5 ("This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."); *Healy v. James*, 408 U.S. 169, 180-81, 33 L. Ed. 2d 266, 92 S. Ct. 2338 (1972) ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas, and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." (quotation omitted)); *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self-evident.").

The Supreme Court assumed a limited forum in *Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), for the purpose of holding unconstitutional the denial of student activity fee funds to a newspaper with religious editorial viewpoints published by an on-campus religious group. Applying its holding in *Lamb's Chapel*, the Court reiterated the distinction to be made between discrimination against speech because of its subject matter, considered permissible to preserve the purposes of the limited forum, and viewpoint discrimination, considered impermissible if directed against speech within the limitations of the forum. *See* 115 S. Ct. at 2517. SOP 5.9 preserves that distinction by prohibiting religious worship and religious instruction by outside groups, a prohibition that state authorities consider necessary to preserve the purposes of the limited public school

forum, and by specifically permitting religious viewpoint speech in relation to matters for which the public school forum is open.

The Equal Access Act cases cited by appellants are not helpful in defining the nature of the forum. While public secondary schools that receive federal financial assistance and maintain limited open forums are constrained by the Equal Access Act, 20 U.S.C. § 4071 *et seq.*, to afford official recognition to student religious groups desiring to conduct non-curricular activities, *see, e.g., Board of Educ. v. Mergens*, 496 U.S. 226, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990); *Ceniceros v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir.), *cert. denied*, 136 L. Ed. 2d 534, 117 S. Ct. 608 (1996); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3d Cir. 1993), the Equal Access Act is inapplicable in the case before us. The *Mergens* line of cases also is inapposite because we are confronted here with the issue of whether an outside religious organization can be barred from the use of a middle school for worship on the basis of a regulation that bars religious services but permits speech from a religious viewpoint on subjects for which the forum is open.

Also to be distinguished is *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996), *cert. denied*, 136 L. Ed. 2d 251, 117 S. Ct. 360 (1996). In that case, there was a request to show a film on the life of Jesus at a senior citizen center and the film included an invitation by the narrator to adopt the Christian religion and to join him in a prayer. That request was denied, a denial that the Tenth Circuit found discriminatory under the circumstances. The City that operated the center had adopted a regulation prohibiting the use of its senior citizen facilities "for sectarian instruction or as a place of religious worship." *See id.* at 1277. That regulation was

promulgated pursuant to a federal statute providing federal funding conditioned on a similar prohibition. Relying on *Lamb's Chapel*, the Tenth Circuit found that the restriction was not viewpoint neutral, since the City's senior citizen centers had been opened to other public presentations regarding the Bible. *See id.* at 1279. In contrast, the forum in the case before us never has been opened to such presentations. The circumstances of the case before the Tenth Circuit therefore were closely akin to the circumstances presented in *Lamb's Chapel*. However, to the extent that the Tenth Circuit suggests that sectarian instruction would have been permissible "even if the City had not previously opened the Senior Centers to presentations on religious subjects," *id.*, we respectfully disagree with that dictum. Moreover, we think that it is reasonable to impose greater restrictions upon the use of a middle school as a public forum than upon the use of a senior citizen center for that purpose, even in connection with after-school use.

B. Reasonableness and Viewpoint Neutrality

Having identified the public forum of M.S. 206B as a limited one, we are confronted with the question of whether the rule prohibiting religious services and instruction is reasonable and viewpoint neutral. We were faulted in *Lamb's Chapel* for "uttering not a word in support of [our] reasonableness holding," *Lamb's Chapel*, 508 U.S. at 393 n.6, in regard to the regulation in that case. We think that it is reasonable in this case for a state and a school district to adopt legislation and regulations denying a church permission to use school premises for regular religious worship. We think that it is reasonable for state legislators and school authorities to avoid the identification of a middle school with a particular church. We think that it is reasonable for these authorities to consider the effect upon the minds of middle school children of designating

their school as a church. And we think that it is a proper state function to decide the extent to which church and school should be separated in the context of the use of school premises for regular church services. Education, after all, is a particularly important state function, and the use of school premises is properly a matter of particular state concern. Finally, it is certainly not unreasonable to assume that church services can be undertaken in some place of public assembly other than a public middle school in New York City.

With respect to the element of viewpoint neutrality, the regulation in question specifically permits any and all speech from a religious viewpoint. What it does not permit is religious worship services. The parties agree that M.S. 206B never has been made available for worship services to any outside group. The school, therefore, cannot be said to have been opened to indiscriminate public use either by policy or practice. The purposes for which the schools in District # 10 have been opened to outside organizations encompass a wide variety of civic and social uses, and any speech conducted in connection with those uses may be bottomed on a religious viewpoint. Worship and religious instruction are forms of speech and cannot be prohibited in an open forum such as a public university. *See Widmar*, 454 U.S. at 269 n.6. Indeed, religious worship services may well be considered the ultimate in speech from a religious viewpoint in an open forum. But the question is whether a distinction can be drawn between it and other forms of speech from a religious viewpoint that District # 10 has elected to allow in the limited forum of a public middle school. We think it can.

What SOP 5.9 is intended to do seems clear: it is intended to prohibit outside groups from using school premises after school for "religious services or religious instruction" while permitting such groups to use school premises for "discussing religious

material or material which contains a religious viewpoint or for distributing such material." In adopting this language, it appears that the New York City Board of Education has attempted meticulously to comply with the teaching of *Lamb's Chapel.*

Appellants concede that what they seek is specifically prohibited by SOP 5.9. They seek to undertake at M.S. 206B on a regular basis the ceremonies, prayers, rites, rituals and religious forms commonly associated with religious services, as well as the teaching commonly associated with the promulgation of religious faith. According to Pastor Hall, the Church proposed to conduct "church worship services," which he described as "including hymn singing, communion, Bible reading, Bible preaching and teaching." In short, what Pastor Hall was proposing was to conduct the religious activities that take place according to a prescribed form and order commonly known as religious services.

There is no question that District # 10 never permitted the use of its premises for these purposes. The District apparently has been prepared to allow the use of its premises for the discussion of religious material in a secular setting and to allow the discussion of secular matters from a religious viewpoint, although the record discloses no request for such use. The distinction between these uses on the one hand, and religious services and instruction on the other, is not difficult for school authorities to make. There is no indication that they have not maintained that distinction under a regulation that is not only reasonable in light of the purposes served by the forum but also is viewpoint neutral.

C. Exclusive Use

Contrary to the district court, we find no significance for this

case in the statutory and SOP provisions requiring that the use of school premises for meetings be non-exclusive. SOP 5.6.2 tracks the language of Education Law § 414(c) in permitting use for "social, civic and recreational meetings and entertainments" that are "non-exclusive and . . . open to the general public." But religious services and instruction are not social, civic or recreational meetings or entertainments. In any event, there is no indication in the record that the Church's services and instruction are not open to the general public. The district court also notes that Standard Operating Procedure 2.11 tracks Education Law § 414(d) in permitting use of school premises for meetings where admission fees are charged, except if "such meetings are under the exclusive control . . . of a religious sect or denomination." However, the record contains nothing about fees for admission to the Church's services. Finally, since the state statute does not include religious services or instruction among permitted uses of school property, and since the SOP specifically prohibits such uses, there is no need for concern about whether the religious uses are exclusive or non-exclusive here. The limitation on the use of the forum in question is clear, reasonable and viewpoint neutral, and that is all it needs to be to pass constitutional muster.

II. The Establishment and Free Exercise Claims

The First Amendment to the United States Constitution, as applicable to the states under the Fourteenth Amendment, prohibits the enactment of any "law respecting an establishment of religion." Neither the State of New York nor the New York City Board of Education has adopted such a law with respect to the use of M.S. 206B. Appellants' establishment claim in this regard seems to be based on the argument that the Board of Education improperly invoked the Establishment Clause to justify its ban on religious services and instruction. But as has

been shown, there is no need for the Board of Education to rely on the Establishment Clause in limiting the use of the public school forum, since the distinctions drawn in the SOP are both reasonable in light of the permitted after-school uses of the forum and viewpoint neutral as well. The cases cited by appellants for the proposition that "government can violate the Establishment Clause's neutrality principle by treating religion worse than other groups" are inapposite, because they pertain to traditional public forums, *see, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2447, 132 L. Ed. 2d 650 (1995), or to a limited forum where the "viewpoint neutral" rule has been violated, *see, e.g.*, *Lamb's Chapel,* 508 U.S. at 395.

The First Amendment also prohibits the enactment of any law "prohibiting the free exercise" of religion. Appellants contend that "the School District flagrantly violates the Free Exercise Clause by singling out religious services and instruction for exclusion from its forum." To support this contention, appellants cite *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). Each of these cases involved specific religious practices--the ingestion of peyote in *Smith* and animal sacrifice in *Church of the Lukumi*.

Smith involved a state law prohibiting the payment of unemployment benefits to persons discharged for misconduct. The law was applied in the case of employees of a drug rehabilitation organization who were discharged for the use of peyote at a ceremony of the Native American Church. The Supreme Court found that the state statute was a valid and neutral law of general applicability and properly enforceable as such. *See Smith*, 494 U.S. at 890.

In *Church of the Lukumi*, the municipal ordinances of the City of Hialeah prohibiting animal sacrifice were challenged by a church of the Santeria religion. The challenge was sustained by the Supreme Court on a finding that the ordinances were not neutral but rather had as their object the suppression of a central element of the Santeria religion. *See Church of the Lukumi*, 508 U.S. at 542. The Court also found that the ordinances were not of general applicability, *see id.* at 545-46, and could not survive strict scrutiny, *see id.* at 546-47.

The state statute and SOP under consideration in this case do not bar any particular religious practice. They do not interfere in any way with the free exercise of religion by singling out a particular religion or imposing any disabilities on the basis of religion. The members of the Church here are free to practice their religion, albeit in a location separate from M.S. 206B. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. That right has not been taken from the members of the Church.

III. The Equal Protection Claim

Appellants rely upon *Police Department v. Mosley*, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972), to support their claim that the Equal Protection Clause of the Fourteenth Amendment does not allow the exclusion of religious worship services from the public schools. In *Mosley*, the challenged Chicago ordinance prohibited picketing on public streets near school buildings. In that case, the Court found that under the Equal Protection Clause and the First Amendment, the public street was a traditional public forum where content-based restrictions must be narrowly tailored to serve a compelling governmental interest. Again, appellants rely upon a case that pertains to a traditional public forum. Appellants contend that

the strict scrutiny test should be applied in connection with the rules prohibiting religious worship services and instruction. However, there is no fundamental right that has been violated. Appellants say that the School District has infringed on the fundamental rights of freedom of speech and freedom of religion. There is no fundamental right of freedom of speech in a limited forum from which various types of speakers and subjects are properly excluded. Nor is the free exercise of religion a fundamental right in a properly limited public forum. *Cf. Fighting Finest*, 95 F.3d at 231. It is only when a traditional public forum "is opened up to assembly or speaking by some groups [that] government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Mosley*, 408 U.S. at 96.

IV. The Religious Freedom Restoration Act Claim

Appellants contend that the School District violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, by using a clear religious classification to deny access to the forum and thereby imposing a significant burden on the religious beliefs of the appellants. The threshold issue under the Act is whether religious practices have been substantially burdened. *See* 42 U.S.C. § 2000bb-1(a). A "substantial burden" under the Act is a government policy prohibiting religious adherents from engaging in conduct that is mandated by their faith. *See Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). The denial of the use of public property for religious services would not seem to substantially burden religious exercise. In any event, this claim is moot, the Act having been held unconstitutional in *City of Boerne v. Flores*, 138 L. Ed. 2d 624, 117 S. Ct. 2157, 2172 (1997). The Court in that case held that Congress had exceeded its Fourteenth Amendment powers when it passed the Act. See id. The Court remarked that the Act represented "a considerable congressional intrusion into the

States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." 117 S. Ct. at 2171. The traditional prerogatives and general authority of the State of New York to regulate for the health and welfare of its citizens should prohibit judicial interference with the establishment of a limited forum in New York schools from which after-school use for religious services and instruction may be barred.

CONCLUSION

The judgment of the district court is affirmed in accordance with the foregoing.

CONCURBY: JOSÉ A. CABRANES (In Part)

DISSENTBY: JOSÉ A. CABRANES (In Part)

DISSENT:
JOSÉ A. CABRANES, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that in addressing the important free speech questions presented in this case, we must apply the level of scrutiny appropriate to governmental restrictions of speech in "limited public forums." Despite the fact that New York Education Law § 414 and school board policy opened the schools to a wide variety of different speakers, and despite the fact that the Supreme Court, analyzing the same statute under similar circumstances, found "considerable force" in the argument that such restrictions of speech "were subject to the same constitutional limitations as restrictions in traditional public forums," *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993), we are constrained by controlling precedents

of this Court and the factual stipulations of the parties to find that the school facilities in this case constituted only a limited public forum. Governmental restrictions of speech in limited public forums will be upheld only if the restrictions are reasonable and viewpoint neutral. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995).

I concur in the Court's judgment insofar as it holds the ban on "religious services" by Community School District No. 10 ("District") to be reasonable and viewpoint neutral. However, because I believe that the District's ban on "religious instruction" discriminates on the basis of viewpoint by allowing private groups to conduct after-school instruction on a wide array of topics only from a secular perspective, I dissent from that part of the Court's judgment upholding the ban on "religious instruction."

I.

In *Deeper Life Christian Fellowship, Inc. v. Board of Education,* this Court adopted an intermediate state court's construction of New York Education Law § 414, *see Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (N.Y. App. Div. 1978), that the use of New York schools is limited to nonreligious purposes, and therefore concluded that in enacting this statute the state intended to create only a limited public forum. 852 F.2d 676, 680 (2d Cir. 1988) (*Deeper Life I*). Because *Trietley* was decided before the Supreme Court's landmark ruling in *Widmar v. Vincent*, 454 U.S. 263, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (holding that public university could not exclude religious worship and teaching from public forum), it may well be that the state court in *Trietley* based its decision on a now-outdated understanding of the Establishment Clause. Nevertheless, *Deeper Life I* was decided subsequent to

Widmar, and its adoption of *Trietley*'s reading of § 414 was reaffirmed in *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991) (*Deeper Life II*), and again in *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 387 (2d Cir. 1992), *rev'd on other grounds*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). The Supreme Court in *Lamb's Chapel* described the very argument pressed by plaintiff in this case--that § 414 and school district policy created a fully-open public forum, not a limited public forum excluding religious uses--as having "considerable force." 508 U.S. at 391. However, the Court ultimately left unresolved the question whether a school that opens its facilities indiscriminately, except as to a very narrow class of excluded communicative uses, may still claim to have created only a limited public forum. *Id.* at 391-92. Therefore, in light of our obligation to follow the decisions of prior panels of this Court unless they have been overruled by a holding of the Supreme Court, *see Gold v. Feinberg*, 101 F.3d 796, 801 (2d Cir. 1996) (holding of prior panel "can only be overruled by this Court sitting in banc or by a decision of the Supreme Court"), we are not free to follow the Supreme Court's strong suggestion, in what is concededly dicta, even though it may amount to an "anvil-like hint," *see ante*, at 6538 (quoting Appellant's Brief at 16).

In addition, we are foreclosed from exploring whether prior practices of the District in the instant case may have opened the forum to religious services or instruction, see *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693 (2d Cir. 1991) (holding that where school has allowed its facilities to be used for particular category of activities, it creates forum that must remain open to category of activities "exemplified by the prior permitted use"), by the unusually sparse record in this case (covering uses of the school during only a single school year) and by the stipulation of the parties that the District "has

consistently followed Policy 5.9 by never renting school facilities to non-school groups or organizations . . . for the purpose of conducting religious worship services and religious instruction on school premises." Joint Stipulated Facts at 9.

Accordingly, I agree that in the circumstances presented here, SOP 5.9 must be judged by the standard reserved for restrictions on speech in limited public forums. We will uphold such restrictions if they are "reasonable in light of the purpose served by the forum," and they do not "discriminate against speech on the basis of its viewpoint." *Rosenberger*, 115 S. Ct. at 2517 (internal citations and quotation marks omitted). Because I believe that the provision of SOP 5.9 banning "religious instruction" is viewpoint discriminatory under the Supreme Court's decisions in *Lamb's Chapel* and *Rosenberger*, I would hold that provision unconstitutional under the Free Speech Clause of the First Amendment to the United States Constitution.

II.

In *Lamb's Chapel*, the Supreme Court rejected as viewpoint discriminatory a school district's denial of a permit for a church-sponsored film series dealing with family and child-rearing issues from a religious perspective. 508 U.S. at 394. The school district, pursuant to New York Education Law § 414, had established a policy permitting school facilities to be used after school hours for "social, civic, and recreational" purposes, but not for "religious purposes." *Id.* at 386-87. The Court found there to be "no suggestion . . . that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by [school district policy]," *id* at 393, nor "any indication . . . that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the

presentation would have been from a religious perspective," *id.* at 393-94. The denial of the permit therefore violated the principle that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 394 (internal quotation marks omitted). The fact that the policy treated all religions alike was immaterial inasmuch as it discriminated between religious and secular viewpoints. *Id.* at 393.

The Court further explained that such viewpoint discrimination was impermissible, "'provided that the defendants have no defense based on the Establishment Clause,'" *id.* (quoting *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (Posner, J.)), and the Court had "no trouble" dismissing any possible Establishment Clause defense. Since the film series would have been shown after school, would not have been sponsored by the school, and would have been open to the public, and since many other private groups had used school facilities in the past for a wide variety of purposes, the Court concluded that there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental." *Id.* at 395.

Elaborating upon its *Lamb's Chapel* decision, in *Rosenberger* the Court held that the refusal by the University of Virginia ("UVA") to fund a religiously oriented student newspaper through the school's Student Activities Fund ("SAF"), while funding a wide variety of other student groups and publications through SAF, also constituted viewpoint discrimination. 115 S. Ct. at 2517. By denying funding to publications because they "primarily promote or manifest a particular belief in or about a deity or an ultimate reality," *id.* at 2520, UVA "required public officials to scan and interpret student publications to discern

their underlying philosophic assumptions respecting religious theory and belief," id. at 2525. This contravened the Free Speech Clause because "the Government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 2516 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)). Such viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 2517 (citing *Perry*, 460 U.S. at 46).

Significantly for our purposes here, the Court expressly rejected the dissent's view that UVA could constitutionally undertake to distinguish between "works characterized by the evangelism of [the student newspaper] and writing that merely happens to express views that a given religion might approve," *id.* at 2550 (Souter, J., dissenting). *See id.* at 2524 (majority opinion). The Court observed that "were the dissent's view to become law it would require the University . . . to scrutinize the content of student speech, lest the expression in question . . . contain too great a religious content. . . . That eventually raises the specter of governmental censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy." *Id.*

As in *Lamb's Chapel*, the Court in *Rosenberger* discerned no Establishment Clause defense for UVA's restriction on religious speech. The Court cited numerous cases firmly providing that the Establishment Clause does not bar the government from providing benefits to religious groups or speakers on an equal basis with other groups and speakers. *See id.* at 2521-23. Funding the newspaper would not have run afoul of the Establishment Clause because UVA had not "'willfully fostered or encouraged' any mistaken impression that

the student newspapers speak for the University." *Id.* at 2523 (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 2448, 132 L. Ed. 2d 650 (1995)).

In light of these teachings of the Supreme Court, I conclude that the District's exclusion of religious instruction in the instant case is not viewpoint neutral. SOP 5.6.1 sweepingly authorizes use of school premises after hours "for the purpose of instruction in any branch of education, learning or the arts." SOP 5.9, however, while allowing "discussion [of] religious material or material which contains a religious viewpoint," bans "religious instruction on school premises after school." The net effect is to require schools to put a halt to any after-school instruction that "contains too great a religious content," *Rosenberger*, 115 S. Ct. at 2524. Where secular viewpoints on a subject are concerned, the District's policy allows private groups not only to discuss the subject, but to instruct others from their secular perspective without hindrance by public authorities. Where religious viewpoints on the same subject are detected, private groups may "discuss" but they may not "instruct." Far from properly treading the delicate line between discrimination based on subject matter or content and discrimination based on viewpoint, as the majority contends, see ante, at 6541, the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination. Indeed, the distinction that the District attempts to draw between instruction and discussion is akin to the distinction drawn by the dissent in *Rosenberger*, but rejected by the Court, between "evangelism" and speech "that merely happens to express views that a given religion might approve," *id.* at 2550 (Souter, J., dissenting). *See id.* at 2524 (majority opinion).

The fact that in the instant case the parties agree that the District has previously allowed secular instruction related to "ethics" and "character," paradigmatic contexts for religious instruction, only underscores the likelihood that the District's policy on "instruction" will systematically suppress sectarian viewpoints. The record reveals that the District has in the past allowed the Boy Scouts to provide "ethical education based on the Scout Oath and Scout Law," n1 and has permitted a group called "Pius XII Beacon," organized under Catholic Charities, to conduct after-school "character training for the students [which] had no religious content." Joint Stipulated Facts at 3, 5-6. That ethics may be taught from a secular perspective but not from a religious perspective effectively places the religious viewpoint at a disadvantage in the marketplace of ideas. If the State may escape the strictures of the Free Speech Clause by merely hindering the religious viewpoint, without banning it entirely (after all, the District still allows religious materials to be "discussed"), then the long line of cases teaching that public authority over private speech must be viewpoint neutral will be easily circumvented.

n1 Although the majority's recitation of the purposes for which the school has been used in the past describes the Boy Scouts as having conducted "training of adolescent boys in various skills, including camping and first aid," ante, at 6534-35, it bears noting that the record also indicates that "ethical education" was included in the Boy Scouts' training. Joint Stipulated Facts at 3.

As in *Lamb's Chapel* and *Rosenberger*, moreover, the District's preference for secular instruction over religious instruction cannot be justified by an Establishment Clause defense. The ban on instruction from a religious perspective, far from being required by the Establishment Clause, if anything offends "the very neutrality the Establishment Clause

requires." *Rosenberger*, 115 S. Ct. at 2525. There is nothing in the record to suggest that by allowing religious instruction to take place after school hours on an equal basis with other forms of instruction the District would or could "willfully foster[] or encourage[] any mistaken impression" that the organizations conducting after-school religious instruction actually speak for the District, *Rosenberger*, 115 S. Ct. at 2523 (internal quotation marks omitted). Because the District has opened itself up so widely to other outside organizations, *see ante*, at 6534-35, while restricting use of school facilities by outside groups to after-school hours and weekends, there is "no realistic danger that the community would think that the District was endorsing religion or any particular creed," *Lamb's Chapel*, 508 U.S. at 395.

We are not the first court to reach the issue of prohibitions on religious, but not secular, instruction. The Court of Appeals for the Tenth Circuit recently held that the City of Albuquerque's ban on "sectarian instruction" in publicly run senior-citizen centers discriminated on the basis of viewpoint and therefore violated the Free Speech Clause. *See Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). That court held that "any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint" and "intrinsically favors secularism at the expense of religion." *Id.* n2

n2 I believe the majority is incorrect in referring to this clear holding as "dictum." *Id.* The majority characterizes *Church on the Rock* as hinging upon the fact that "the City's senior citizen centers had been opened to other public presentations regarding the Bible," and attempts to distinguish the instant case on this basis. *Ante*, at 6542. However, the Tenth Circuit explicitly found that "even if the City had not previously opened the Senior Centers to

> presentations on religious subjects, its policy would still amount to viewpoint discrimination." 84 F.3d at 1278. The Court found that "any" prohibition of religious instruction by outside groups where other instruction is permitted is "inherently" viewpoint discriminatory. *Id.* The fact that the court amplified upon this holding by explaining precisely how and why the ban unconstitutionally suppressed the religious viewpoint in that case does not detract from the court's holding that the ban was unconstitutional on its face.

Because I conclude that the District's policy banning after-school religious instruction by outside groups, without banning instruction from secular viewpoints, discriminates on the basis of viewpoint, I would hold that it is unconstitutional under the Free Speech Clause of the First Amendment.

Unlike religious "instruction," there is no real secular analogue to religious "services," such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism. Indeed, the dictionary definition of the term "services" in this context suggests as much: "a) public worship b) any religious ceremony." Webster's New World Dictionary at 1226 (Prentice Hall 1994). Because "services" are by definition religious in nature, it does not appear that they could ordinarily be understood to serve as a vehicle for both religious and secular viewpoints. I am therefore satisfied--while recognizing that the line between permissible "content" discrimination and impermissible "viewpoint" discrimination "is not a precise one," *Rosenberger*, 115 S. Ct. at 2517--that the District's ban on religious "services" in SOP 5.9 is best described as a form of "content" discrimination that does not favor one viewpoint over another. For this reason, I concur in so much of the majority's opinion as upholds the ban on religious worship.

I note, however, that I am more skeptical than the majority appears to be of the government's ability to draw distinctions between religious worship--or indeed religious instruction--and "other forms of speech from a religious viewpoint that District # 10 has elected to allow . . . ." *Ante*, at 6544. In some circumstances, enforcement of the exclusion of religious "services" might lead to "excessive entanglement with religion," *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). *Cf. Rosenberger*, 115 S. Ct. at 2524; *Board of Educ. v. Mergens*, 496 U.S. 226, 248, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990); *Widmar*, 454 U.S. at 270 n.6. There may be cases in which the parties dispute whether or not a proposed activity for which permission to use school premises is denied actually constitutes religious instruction or worship, and the very act of making such classifications may deeply--and unconstitutionally--entangle public officials in essentially theological determinations. However, this issue does not arise in the instant case, as the parties have stipulated that plaintiff seeks to use a school gymnasium for "religious worship services." Joint Stipulated Facts at 8-9.

III.

In conclusion, while in the circumstances presented I concur in the judgment of the Court upholding the District's ban on religious services, I believe that the ban on religious instruction favors secular over religious viewpoints in violation of the Free Speech Clause of the First Amendment. I therefore respectfully dissent from that part of the judgment upholding the ban on religious instruction.

THE BRONX HOUSEHOLD OF FAITH, ROBERT HALL, and JACK ROBERTS,
Plaintiffs, -against- COMMUNITY SCHOOL DISTRICT No. 10, and
CHARLES WILLIAMS, in his official capacity as President of
the Board of Education for Community School District # 10, Defendants.

95 Civ. 5501 (LAP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

1996 U.S. Dist. LEXIS 18044

December 5, 1996, FILED

DISPOSITION: Plaintiffs' motion for summary judgment denied, and defendants' cross-motion for summary judgment granted.

COUNSEL: For THE BRONX HOUSEHOLD OF FAITH, plaintiff: Joseph P. Infranco, Migliore & Infranco, P.C., Commack, NY. For JACK ROBERTS, plaintiff: Joseph P. Infranco, (See above).

For COMMUNITY SCHOOL DISTRICT NO. 10, defendant: Patricia B Miller, O. Peter Sherwood, New York, NY. For CHAS. CHARLES WILLIAMS, in his official capacity as President of the Board of Education for Community School Board District No. 10, defendant: Patricia B Miller, (See above). For THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, defendant: Patricia B Miller, (See above).

JUDGES: LORETTA A. PRESKA, U.S.D.J.

OPINIONBY: LORETTA A. PRESKA

OPINION: MEMORANDUM AND ORDER

LORETTA A. PRESKA, District Judge:

This action arises from defendants' denial of plaintiffs' request to rent the Merseau Middle School for religious worship. Plaintiffs Bronx Household of Faith, Robert Hall and Jack Roberts allege that Community School District # 10 ("School District") in the Bronx has violated the Free Exercise and Free Speech Clauses of the First Amendment, the Equal Protection Clause, and the Religious Freedom Restoration Act by denying them use of Public School M.S. 206B for religious worship. The parties have cross-moved for summary judgment. For the reasons stated below, plaintiffs' motion is denied, and defendants' cross-motion is granted.

BACKGROUND

Responding to a need for a larger building in which parishioners could convene on Sunday mornings, the evangelical Christian church, Bronx Household of Faith, sought permission to rent M.S. 206B, Anne Cross Merseau Middle School in September of 1994. (P11 Joint Stipulation of Facts ("Stip.")). The School District denied the church permission based on its "Standard Operating Procedures: Topic 5: Regulations Governing the Extended Use of School Facilities" ("SOP") and New York Education Law § 414 (McKinney's 1995), both of which prohibit rental of school property for the purpose of religious worship. (Stip. PP 15-16)

The SOP sets out a hierarchy of permitted uses. "The primary

use of school premises must be for Board of Education programs and activities." (SOP5.3) "After Board of Education Programs and activities, preference will be given to use of school premises for community, youth and adult group activities." (SOP5.5) In addition to these uses and uses where admission, donations and the like are collected, Section 5.6 states that school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education, learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such uses shall be nonexclusive and open to the general public.

5.6.3. For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

(Stip. P 6) Specifically, section 5.9 provides:

No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

(Stip. P 15) Section 5.8 also restricts commercial use of school premises.

Similarly, New York Education Law § 414 permits use of school facilities for meetings, with the following exception:

such use shall not be permitted if such meeting, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization . . . .

(SOP 5.9)

During the 1994-95 school year, the School District permitted a variety of groups to use the school facilities for the enumerated purposes. Although the School District did permit the Grace Lutheran Church to rent the school, the church rented the school not for religious worship but for conducting a program on Black History Month (Stip. P 7), a use entirely consistent with the enumerated purposes in SOP5. The School District has never, in fact, rented the school facilities for the purposes of either religious worship or religious instruction. (Stip. P 18)

After the Bronx Household's second request to rent the space

and have the School District policy changed, pastors Robert Hall, Jack Roberts and the Bronx Household brought suit in the Supreme Court of the State of New York, County of the Bronx, under *42 U.S.C. § 1983.* The School District then removed the case to federal court. Plaintiffs moved, and defendants cross-moved for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the following reasons, plaintiffs' motion is denied and defendants' cross-motion is granted.

DISCUSSION

Under Rule 56(c), "[a] motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 36 (2d Cir. 1994); *see* Fed. R. Civ. P. 56(c). *See generally Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the particular litigation if application of the relevant substantive law requires their determination. *Anderson*, 477 U.S. at 248.

"A party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle it to judgment as a matter of law." *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996); *accord Chambers*, 43 F.3d at 36. "In moving for summary judgment against a party who will bear the ultimate burden of proof at

trial," however, "the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995); *accord Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("The moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). The moving party, in other words, does not bear the burden of disproving an essential element of the nonmoving party's claim.

If the moving party meets its burden, the burden shifts to the nonmoving party to come forward with "affidavits, depositions, or other sworn evidence as permitted by Fed. R. Civ. P. 56, setting forth specific facts showing that there exists a genuine issue of material fact." *Rule*, 85 F.3d at 1011; *accord* Fed. R. Civ. P. 56(e); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Instead, the nonmovant must "'come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely . . . on the basis of conjecture or surmise.'" *Trans Sport v. Starter Sportswear*, 964 F.2d 186, 188 (2d Cir. 1992) (citation omitted).

"In ruling on a motion for summary judgment, the district court is required to draw all factual inferences in favor of, and take all factual assertions in the light most favorable to, the party opposing summary judgment." *Id.; accord Chambers*, 43 F.3d at 36. "The function of the district court in considering the motion for summary judgment is not to resolve disputed issues of fact but only to determine whether there is a genuine issue to be tried." *Rule*, 85 F.3d at 1011. Accordingly, "assessments of credibility and choices between conflicting versions of the

events are matters for the jury, not for the court on summary judgment." *Id.* Similarly, "any weighing of the evidence is the prerogative of the finder of fact." *Id.* "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers*, 43 F.3d at 37 (emphasis added).

I. Plaintiffs' Free Speech Claim

Plaintiffs challenge the constitutionality of SOP5 on the grounds that SOP5 prohibits them from renting public property, namely the middle school, for religious worship, thereby violating their First Amendment right to free speech. Additionally, plaintiffs challenge the constitutionality of New York Education Law § 414, pursuant to which SOP5 was promulgated, on the same grounds.

The extent to which government may regulate expressive activity on public property depends upon the character of the public property in question. *See Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1984). The Supreme Court has recognized three possible classifications for publicly-owned property and has articulated the extent to which expressive activity may be regulated on each. See *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985).

With respect to the first category of public property, "traditional public fora," the state's power to regulate expressive activity is most limited. "Traditional public fora" include streets and parks -- those areas that "have immemorially been held in trust for the use of the public . . .

and have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939). Any content-based regulation of a traditional public forum is enforceable only when "necessary to serve a compelling state interest" and must be "narrowly drawn" to serve that purpose. *Perry*, 460 U.S. at 45, 103 S. Ct. at 955.

The second category of public property includes "public property which the state has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 46. A nonpublic forum generally refers to property that is not open for communicative purposes "either by tradition or by designation." *Lamb's Chapel v. Center Moriches Un. Free Sch. Dist.*, 959 F.2d 381 (2d Cir. 1992) (citing *Perry*, 460 U.S. at 46, 103 S. Ct. at 955), *rev'd on other grounds*, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993). The government may transform such property into a public forum, however, by designating it for communicative purposes. A public elementary school, for example, although public property, is a nonpublic forum with respect to the general community. *See Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (citing *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123, 102 S. Ct. 970, 71 L. Ed. 2d 109 (1981)). The state may transform an elementary school into a traditional forum by opening it to the public, either by policy or practice, for communicative purposes. Although the state is never obligated to open a nonpublic forum, once it does, any regulation is subject to the same scrutiny as that governing a traditional forum. *Fighting Finest, Inc. v. Bratton,* 1996 U.S. App. LEXIS 28748, No. 95-9042, slip op. 7935, 7944-45 (2d Cir. Sept. 9, 1996).

The third category of public property is the designated or "limited public forum." Within this category "property remains

a nonpublic forum as to all unspecified uses and exclusion of uses." *Deeper Life*, 852 F.2d at 679-80 (citations omitted). Any regulation of expressive activity in a nonpublic forum need only be reasonably related to a legitimate government concern. See *International Soc'y For Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *cert. granted*, 502 U.S. 1022, 112 S. Ct. 855 (1992). The regulation "need only be viewpoint neutral to pass constitutional muster." *Cornelius*, 473 U.S. at 802, 105 S. Ct. 948, 956 (1983); *Perry*, 460 U.S. at 47 ("The State may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."). Thus, the state is free to transform a nonpublic forum into a public forum for certain subjects of expression or activity. Once it opens up a nonpublic forum for expression on a particular topic or designated range of topics, however, it may not discriminate based on the viewpoint of any speaker on a permissible topic. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 132 L. Ed. 2d 700, ___ U.S. ___, 115 S. Ct. 2510 (1995) (stating that viewpoint discrimination is impermissible "when directed against speech otherwise within the forum's limitations").

To determine whether the denial of the Bronx Household's request to use the school for religious worship is constitutionally permissible, I must determine, as a threshold matter, which type of forum is involved. Although a grade school is generally considered a nonpublic forum, *see Deeper Life*, 852 F.2d at 679, through SOP5 the School District has transformed the school into either a public forum or a limited public forum. To determine which type of forum has been created, I look not only to New York Education Law § 414 and SOP5 but also to the practices and the intent of the school in creating the forum. *See Fighting Finest, Inc. v. Bratton*, 1996 U.S. App. LEXIS 28748, No. 95-9042, slip op. 7935, 7947

(listing factors determining which forum has been created, including nature of the property, intent, and conditions of access).

The first prong of the inquiry entails an examination of the laws governing this forum. Plaintiff contends that the language of SOP5 is so broad that virtually every topic is permissible except religious worship. Neither SOP5 nor NY Educ. Law § 414, however, designates a public forum excluding solely religious worship. The language of SOP5, which tracks that of § 414, creates a hierarchy of permissible uses that clearly prioritizes use of school premises for Board of Education programs and excludes virtually all exclusive organizations. n1 Section 5.9 prohibits "religious services or religious instruction," and Section 2.11 extends this prohibition to virtually all exclusive groups through the following language:

Such permit shall not be permitted if such meetings are under the exclusive control . . . of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization, other than organizations of veterans and volunteer firemen.

n1 Despite the apparent variety of subject matter for which SOP5 provides access, it is not all-encompassing. At oral argument, plaintiffs' counsel suggested that the SOP's permitting social, civic and other community welfare topics must, by its very breadth, be read to encompass religious worship, and the prohibition on religious worship removed. He noted, inter alia, that churches do more for the welfare of the community than many of the other entities and activities which have been accepted by the School District. Historically and constitutionally in this country, however, religion cannot be lumped with other social, civic and community welfare activities. From our earliest Pilgrim

forefathers, it has been the tradition in this country for government and religion to remain separate. Establishment Clause, U.S. Constitution. Therefore, the assumption that broadly stated purposes such as "civic" and "community" must also encompass "religious" is unfounded.

Such exclusive societies presumably could not serve the community in the same manner that nonexclusive social, civic and cultural groups would. Under New York Education Law § 414, pursuant to which SOP5 was promulgated, "access to the school property is permitted only where it serves the interests of the public in general, rather than that of sectarian groups." *See Deeper Life Christian Fellowship*, 852 F.2d at 680. Therefore, because SOP and New York Education Law § 414 clearly limit access to the school to those purposes enumerated and effectively prohibit use by all exclusive groups, SOP5 and New York Education Law § 414 indicate the creation of a limited public forum and not a public forum.

The next step of our inquiry necessitates a close scrutiny of the practices of the School District in applying the SOP. The facts as to the School District's past practice are not in dispute. Paragraphs seven, eight and ten of the Stipulated Facts list the non-school groups that have met in schools within the School District during the 1994-95 school year. All the meetings, including those held by the Bronx Household and other churches and religious-affiliated groups, were for activities expressly authorized by SOP5. As the parties have stipulated, none of the meetings was for religious worship. (Stip. P 8) Thus, the School District's past practices indicate the creation of a limited public forum.

The last step of the forum analysis requires a careful assessment of the School District's intent in opening access to the school to non-school groups. *See Longo v. U.S. Postal*

Service, 953 F.2d 790 (2d Cir. 1992) ("The government does not create a public forum through unconscious, unspoken practices or by permitting limited discourse but 'only by intentionally opening a nontraditional forum for public discourse.'"). The past practices of the School District are one indicia of its intent. *See Deeper Life Christian Fellowship v. Board of Educ.* 852 F.2d 676 (2d Cir. 1988) (citations omitted) (stating that the intent of the school in creating a forum "is a fact-oriented inquiry, and the past practice of the School Board in regard to its use of the property at issue is a proper consideration in that inquiry"). The School District's past practices reveal no intent to create an open forum. The SOP is the only other indicium of the School District's intent. Because the School District has never deviated from the purposes enunciated in the SOP, it cannot be said to have evinced any intent other than that intent embodied in SOP. Although the SOP establishes relatively broad categories of permissible uses, the restriction contained in SOP5.9 as well as the explicit restrictions contained in section 2 of the SOP n2 indicate an intent to limit access to the forum.

n2 Plaintiffs' counsel conceded at oral argument that this section is "rife with restrictions."

Examining the SOP, New York Education Law § 414, the past practices and the intent of the School District, I find that the School District has created a limited public forum, and not a public forum. Because the School District has created a limited forum, any regulation of that forum need only be reasonably related to a legitimate government concern. *Perry*, 460 U.S. at 47. The language of both SOP5 and New York Education Law § 414 strongly suggests that the restrictions exist to preserve the nonexclusive nature of the property. I find that SOP5 and New York Education Law § 414 constitute reasonable regulations of expression related to the legitimate

government concern of preserving and prioritizing access to the middle school primarily for educational purposes and, secondarily, for nonexclusive public and community activities.

II. Plaintiffs' Establishment Clause Claim

Plaintiffs claim that SOP5 and New York Education Law § 414 violate the Establishment Clause of the First Amendment because the denial of access to the school premises inhibits the Bronx Household from practicing its religion. Under the Establishment Clause of the First Amendment to the Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Plaintiffs assert that the government has a "duty to accommodate" religious speech in a public forum and that such accommodation does not violate the Establishment Clause. Because I find that the state has not created a public forum and thus must demonstrate only a legitimate purpose to justify its ban of exclusive groups and has done so, I need not address this argument.

III. Plaintiffs' Equal Protection Claim

Plaintiffs also assert that a content based restriction of free speech in a public forum violates the Equal Protection Clause. Plaintiffs urge me to review SOP5 and Education Law § 414 under a standard of strict scrutiny. Because the plaintiffs' argument is premised on the existence of an open forum, I need not address this contention either.

CONCLUSION

Because I find that SOP and New York Education Law § 414, together with the practices and intent of the School District in question create a limited public forum and not a

public forum, plaintiffs' motion for summary judgment is denied, and defendants' cross-motion for summary judgment is granted.

Dated: New York, New York

December 5, 1996

LORETTA A. PRESKA, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of November, one thousand nine hundred and ninety-seven.

The Bronx Household,

Plaintiff-Appellant,

v. Dkt. No: 96-9633

Comm. School District,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant The Bronx Household.

Upon consideration by the pannel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: (signature)
Beth J. Meador
Administrative Attorney

Date: November 24, 1997

UNITED STATES CONSTITUTION, AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1.... No State shall ...deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK EDUCATION LAW §414

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the

commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be

permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civic forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, or to provide child care services during school hours for the children of pupils attending the schools of the district and, if there is additional space available, for children of employees of the district. Such determination shall be made by each district's board of education, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) (Added, L 1991) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section. Any such use, pursuant to paragraphs (a), (c), (d) and (h) of subdivision one of this section, shall not allow the exclusion of any district child solely because said child is not attending a district school or not attending the district school which is sponsoring such use or on which grounds the use is to occur.

STANDARD OPERATING PROCEDURES: TOPIC 5: REGULATIONS GOVERNING THE EXTENDED USE OF SCHOOL FACILITIES

5.6 In addition to the use described in items 2.11, 5.3 and 5.5, school premises may also be used for the following purposes:

5.6.1 For the purpose of instruction in any branch of education,learning or the arts; examinations; graduations.

5.6.2 For holding social, civic and recreational meetings and entertainments,and other uses pertaining to the welfare of the community; but such uses shall be non-exclusive and open to the general public.

5.6.3 For polling places for holding primaries, elections and special elections for the registration of voters; and for holding political meetings where representatives of different viewpoints may be heard; but no meetings sponsored by political organizations shall be permitted unless expressly authorized by a vote of the Board of Education.

5.6.4 For civic forums and community centers in accordance with applicable law.

5.6.5 For recreation, physical training and athletics, including competitive athletic contests of children attending nonpublic, nonprofit schools.

5.6.6 For such other uses as may be authorized by law.

5.9 No outside organization or group may be allowed to conduct religious services or religious instruction on school premises after school. However, the use of school premises by outside organizations or groups after school for the purpose of discussing religious material or material which contains a religious viewpoint or for distributing such material is permissible.

STANDARD OPERATING PROCEDURE 7: GUIDELINES GOVERNING FEES FOR THE EXTENDED USE OF SCHOOL BUILDINGS (DURING HOURS SCHOOLS ARE NOT OPEN)

7.1 Fee Schedule Organizations

The Organizations listed below shall be charged the fees as stated in the most current "Fee Schedule," available from the appropriate Permit Office or Office of School Facilities. All other organizations are categorized as cost schedule organizations (see item 7.2).

7.1.1 Local Adult Groups, which include local tenant groups, taxpayer associations, drama clubs, local merchant associations, senior citizen groups, and local chapters of tax-exempt organizations using the school facilities for non-fund raising purposes;

7.1.2 Local Youth Groups, including scouts, little

leagues, teen clubs, etc.;

7.1.3 Government Organizations, which include federal, state and city organizations and programs (e.g. Parks Department, Police and Fire Departments, Board of Elections, etc.); and

7.1.4 Board of Education related groups or activities.

7.2 Cost Schedule Organizations

The following organizations shall be charged a supplemental fee of at least 10%. However, where two or more organizations request simultaneous use of premises, the applicable fees and space charges may be shared.

7.2.1 Use of school facilities for nonpublic employee recreation;

7.2.2 Unions, professional societies, and similar organizations;

7.2.3 Non-Board of Education-related educational agencies, including private schools and universities; and

7.2.4 Social Service Agencies, which charge a membership, registration, or other fee and use the school facilities in the absence of their own facility. These include local "Y"s, settlement houses, and similar agencies.